

# Michigan Law Review

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Volume 87 | Issue 6

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1989

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### Recommended Citation

Stephen J. Schulhofer, *Just Punishment in an Imperfect World*, 87 MICH. L. REV. 1263 (1989).  
Available at: <https://repository.law.umich.edu/mlr/vol87/iss6/8>

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# JUST PUNISHMENT IN AN IMPERFECT WORLD

Stephen J. Schulhofer\*

QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW. By David L. Bazelon. New York: Alfred A. Knopf. 1988. Pp. xxiii, 325. \$19.95.

During a tenure that spanned almost forty years as a judge on the U.S. Court of Appeals for the D.C. Circuit (including sixteen years as chief judge), Judge David Bazelon was a thought-provoking and usually controversial presence in the world of criminal law practice and scholarship. In *Questioning Authority*, he provides a collection of some of his most important judicial opinions and other writings. The volume addresses, among other topics, the insanity defense, the causes of crime, rights of juveniles, problems in assuring effective counsel for defendants, standards for prison administration, and abuses of psychiatry in this country and in the Soviet Union. In addition to providing a convenient source for the central passages of such Bazelon classics as *Durham v. United States*,<sup>1</sup> *United States v. Brawner*,<sup>2</sup> and *United States v. Decoster*,<sup>3</sup> the book reprints portions of Bazelon's most important law review articles, including his controversial call for a broadening of criminal law excuses<sup>4</sup> and his devastating indictment of our inadequate system of affording defense counsel for the indigent.<sup>5</sup> With a general introduction and explanatory passages at the beginning of each section and chapter, the book succeeds (uncommonly well for a collection of this kind) in linking its components into a coherent whole.

Here, as throughout his career, Judge Bazelon has set for himself two missions. The first, as a combination teacher, muckraking journalist and moral witness, is to open our eyes to pervasive deprivation

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1. 214 F.2d 862 (D.C. Cir. 1954) (adopting new test of legal insanity).

2. 471 F.2d 969, 1010 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part, dissenting in part) (proposing replacement for the *Durham* rule).

3. 487 F.2d 1197 (D.C. Cir. 1973) (proposing standard for effective assistance of counsel).

4. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976).

5. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

and inequality that break faith with our pledge to be a nation "with liberty and justice for all." The book is filled with vivid, moving portrayals of the links between poverty and crime, the abuses of expertise and bureaucratic power, and the impact of economic inequality on the fair and accurate pursuit of truth in the administration of justice. Anyone concerned about public policy toward crime can profit from the uncompromising vision of reality and the compassionate sensitivity that inform all of Bazelon's writing.

Bazelon's second mission, as a working jurist and practical reformer, is to offer real-world proposals for solving problems or at least mitigating injustice. In this Bazelon, unfortunately, is far from a success. The disappointments can be traced to the details of specific Bazelon positions, but the larger problem centers on the particular legal method that Bazelon's writings epitomize.

Reading in juxtaposition the dozen or so topics collected here brings home the distinctive stamp of a Bazelon analysis. "Questioning" is key, as the title implies. Predictably, Bazelon's first target is the abstraction at the center of an area of doctrinal reasoning — free will, disease, or "effective" counsel. The opening move brings assumptions to the surface and tests them against a reality of detailed and disturbing facts. Next, Bazelon invokes other disciplines to evaluate the premises he has exposed. And he seeks to sustain the probing and questioning through process. The Bazelon posture of constant critique, a kind of bourgeois "permanent revolution," strives to institutionalize itself through an invigorated and essentially interdisciplinary adversary system, in which behavioral science challenges the assumptions of legal doctrine and lawyers challenge the methodology of the scientific disciplines.

These are powerful tools, stimulating to some, disturbing and destabilizing to others. But one authority no one wants to question is the authority of truth, and Bazelon's process is part of the pursuit of truth. Or is it? This reader, sympathetically predisposed and substantively persuaded by many of Bazelon's problem-exposing endeavors, nonetheless concluded the journey with many doubts about the value of this path to social knowledge.

The doubts center only partially on the institutional capacities of appellate judges and courts in general. Many of my concerns would apply equally if Bazelon's enterprise had been housed in the academic world rather than in the D.C. Circuit. For one sees Bazelon today as heir to and guardian of the legacy of Legal Realism. He has all its disdain for formalistic abstractions, all its faith in empiricism and in the liberating, progressive potential of a properly harnessed social science. Bazelon never sheds his optimism about the capacity of process to keep facts and values distinct, never loses confidence in the potential

contributions of expertise (including the jury's expertise in reading the moral sentiments of the community).

Yet Bazelon is an uneasy heir. His problematic, vintage 1930 commitments are married to the assumptions and perspectives of a quintessential "sixties person." What Bazelon wants to question is *authority* — whether exercised directly by government or indirectly under the guise of social and scientific expertise. He is acutely aware of the problems of the expert who obfuscates her methodology, oversteps the bounds of her discipline, or lets preconceptions bias her interpretation of data. His amalgam of thirties-realism and sixties-skepticism is bound to produce more questions than answers, but of this he is proud (p. xvii). Innocent of Critical Legal Studies, Bazelon retains a deep faith in the abiding value of the well-chosen question, indeed of the unbounded proliferation of questions.

Even the academics in Bazelon's audience can be forgiven if they reach the point of yearning to stem the endless flow of inquiry, of longing to pose the pragmatist's question, "To what end?" Perhaps less at home on the bench than in an especially ivory tower version of the academy, Bazelon thrives on unpacking the many ramifications of a problem, yet is slow to grapple with the hard choices entailed in designing solutions. And one need not be Edmund Burke to appreciate that continual reexamination and uncompromising pursuit of improvements carry price tags that at some point exceed their expected benefits. Yet Bazelon opts at every turn to open up the judicial process to more questions and to "the widest possible array of information" (p. xxi); he recognizes no limits on the capacity of a working social decision process to assimilate more information and to accommodate the instability that constant critique must entail.

Doubts associated with the methodology of constant critique are compounded by the content of Bazelon's substantive vision. A distinctive conception of criminal responsibility lies at the core of this book. Bazelon's major premise, often repeated, reflects mainstream academic thinking: "Our collective conscience does not allow punishment where it cannot impose blame."<sup>6</sup> Two subsidiary principles embellish Bazelon's conception of blame. First, blame attaches only when, under all the individual circumstances, the actor "could reasonably have been expected to have conformed his behavior to the demands of the law."<sup>7</sup> Second, blame attaches only when the defendant can be found at fault according to prevailing community standards.<sup>8</sup> To-

6. P. 48 (quoting *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945)).

7. P. 8. See also p. 27 ("[I]ndividualization is a prerequisite to a moral system of criminal justice") and p. 61 ("The insanity defense is based on the premise that it is unjust to convict a man for behavior he could not control.").

8. See, e.g., p. 57 ("[I]n each case we allow the jury to hear all relevant information and ask it to decide whether by prevailing community standards the defendant was at fault").

gether with Bazelon's emphasis on the prerequisite of blame, these two elements — individual capacity to conform and community standards — reflect common understandings about the requirements of just punishment. Yet in drawing out their implications, Bazelon reaches conclusions that smack of the radical fringe. As much as people of compassion will want to agree with Bazelon that punishment should presuppose fault, his rigorous extrapolation from this premise unexpectedly highlighted, for me, the importance of locating countervailing principles and workable limitations. I focus on this problem in the final sections of this review.

*Questioning Authority* is, nonetheless, a remarkable testament. It is the record of a life well-lived, in the sincere and energetic pursuit of justice. Many readers will be inspired to keep alive the spirit of unending challenge to authority and unfailing sensitivity to deprivation and inequality for which Judge Bazelon's career serves as a shining exemplar. Others will come away frustrated by meager results, for there were few (if any) unmistakable successes and many more false starts and backlashes for which the Bazelon approach was at least partly responsible. *Questioning Authority* supports all too readily a lesson of nihilism that is, of course, precisely the opposite of its author's intention. The book makes it all too easy to understand the political fallout of progressive social programs tried sporadically in the mid-1960s and late 1970s. It illustrates all too plainly the reasons why a Democratic presidential candidate felt obliged to campaign on a platform of "competence" and hesitated to embrace the supposedly fatal "L-word."

This review focuses on three areas in which the promise and the disappointments of the Bazelon approach are most in evidence — social policy toward crime control, the law of excuse generally, and the insanity defense specifically. Unlike many of Judge Bazelon's critics, I find his dissatisfaction with legal doctrine and current social policy important and telling. But, sharing his sense of urgency about the festering injustices of criminal law administration, I suggest the need for a more limited form of "questioning" and a more qualified attention to fault than Judge Bazelon would allow.

## I. CRIME CONTROL POLICY

Judge Bazelon sets a framework for all of his essays by identifying, early in the volume, two ostensibly distinct approaches to the criminal law. Both approaches view the establishment of order as a moral imperative in a civilized society. But in the first, which Bazelon describes as "law as external constraint," concern for social justice is allowed little room. Instead, in "[a]n essentially amoral process," heavy costs are imposed on those who disturb the desired state of affairs. As a result, "the cost of violating the law [is] so great that few will dare to violate it" (p. 6).

The alternate approach, which Bazelon champions, is built on the internalization of controls through the moral acceptability of legal commands. "[T]he law's aims must be achieved by a moral process which recognizes the realities of social and economic injustice. This philosophy sees externally imposed order — repressive order — as suffering from the same basic defect as 'disorder': both lack moral authority."<sup>9</sup>

Bazelon draws several lessons from his preference for the internalization of controls. Above all, he rejects proposals to "get tough" on crime. Since he views the choice between internal and external control as a choice between "moral order" and "repressive order" (p. 15), he sees the "get tough" approach as an immoral solution even if it could work. But Bazelon emphasizes his conviction that the "get tough" approach cannot work. He doubts that it is efficient because it entails hidden costs: the invasions of privacy associated with aggressive law enforcement, and the loss of liberty associated with the unnecessary confinement of false positives — defendants mistakenly assumed to require incarceration to prevent future misbehavior (p. 14). He also questions whether getting tough can affect the crime rate: at best, few offenders will be arrested (p. 22); incarceration has not enhanced deterrence (p. 95); prisons have not reduced recidivism (p. 99).

The alternative to getting tough is a moral order. To achieve moral order, society must respect Bazelon's major premise: "the law should not convict unless it can condemn" (p. 8). Condemnation, in turn, presupposes satisfaction of two prerequisites: (1) "the actor . . . could reasonably have been expected to have conformed his behavior to the demands of the law," and (2) "society's own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the act he committed" (p. 8). Bazelon's first prerequisite leads to the elaboration of principles of blameworthiness in the substantive criminal law; his views in that regard will receive attention at a later point in this review.<sup>10</sup> But the second prerequisite mandates particular social policies toward crime control. Getting tough is indefensible because that approach ignores the realities that deprive ghetto youth of stability, self-esteem, a sense of purpose in life, and reasonable prospects for social or economic well-being. Moral order requires that society seek to prevent crime by "a substantial attack on the uninhabitable housing, insufficient food, medieval medical care, and inadequate educations suffered by people who commit street crimes" (p. 22). Ultimately, Bazelon suggests, a moral order through internal controls will produce greater order more cheaply because compliance will be voluntary.

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9. Pp. 6-7. Cf. J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986).

10. See *infra* text accompanying notes 29-90.

Bazelon's outlook, much in vogue in the 1960s,<sup>11</sup> has long since been out of fashion. Many of the reasons for this development are obvious. Bazelon is hopelessly hyperbolic in asserting the futility of a "get tough" approach. Low arrest rates certainly weaken the deterrent effect of criminal sanctions, but it hardly follows that increasing the rates of conviction and incarceration or increasing the severity of punishments can have no impact on the crime rate. Prisons are no panacea, but Bazelon's dismissive criticisms overlook deterrent and incapacitative effects that can hardly be ignored.<sup>12</sup>

On the other side of the ledger, Bazelon's argument for the cost-effectiveness of his internal control approach rings hollow. Moral order does not come cheap. Progressive reform of housing, welfare, and education policies will require big bucks and a lot of time. Much of the expenditure is imperative in humanitarian terms and can help avoid a grotesque waste of human resources. But its contribution to reducing the crime rate is speculative. Though Bazelon's discussion of voluntary compliance hints at important links between morality and efficiency,<sup>13</sup> the effort to defend social welfare expenditures as a means of efficient crime control is far from convincing.

Bazelon's more interesting claim is that the internal control approach should be preferred to external control even if the latter would work. But apart from the loaded terminology ("moral order" vs. "repressive order"), it is not at all clear why this should be the case.<sup>14</sup> In the remainder of this section, I explore two themes that are central both to the Bazelon position and to the wider debate about criminal justice policy. First, what are the appropriate claims of fairness and efficiency in the design of a just system of punishment? Second, what

11. See, e.g., R. CLARK, *CRIME IN AMERICA* (1970).

12. See PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, NATIONAL ACADEMY OF SCIENCES, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 6-7, 9 (1978). Judge Bazelon relies on statistics that "consistently demonstrate[ ] that prison sentences are followed by higher rates of recidivism than are nonprison sentences." P. 99 (footnote omitted). There are indeed reasons for concern that prisons often function as "schools for crime." But the implication that imprisoned offenders have higher recidivism rates *because* of their exposure to prison is misleading. Such offenders presumably were sentenced to prison because they posed a higher risk of recidivism in the first place.

In a similar vein, Judge Bazelon argues: "Today, the criminal justice system prosecutes, convicts, and incarcerates a larger proportion of those arrested for felonies than it did fifty years ago. Yet crime continues." P. 95. But failure to eradicate crime does not suggest that our efforts are completely futile. And even if crime rates are higher than in the past, it does not follow that get-tough policies have had no deterrent effect; crime rates today might have been higher still without such policies.

13. See *infra* text accompanying notes 18-22.

14. Addressing the argument that our society cannot afford the expenditures necessary to achieve social justice, Bazelon recognizes that the costs will be very high, but states: "Nevertheless, these costs must be borne, for there is no alternative consistent with the survival of a truly free democracy." P. 12.

is the relationship of individual fault to societal fault in determining whether punishment is fair?

### A. *Fairness versus Efficiency*

The connections between moral principle and internal control (or between amorality and external control) need some sorting out. One objection to Bazelon's model is that the external control approach has its own built-in morality.<sup>15</sup> But Bazelon is right to see that many influential scholars (especially those associated with the economic analysis of law) do take the deliberately amoral line that characterizes his external control model.<sup>16</sup>

A converse and more fundamental difficulty is that the internal approach has no necessary connection to a desirable morality. The socially promoted internalization of controls can be every bit as threatening to liberty as a system of order that relies on external constraints. The latter is, if anything, more respectful of the autonomy of the human personality. There is no *a priori* gain in substituting Aldous Huxley's *Brave New World* for George Orwell's *1984*. Of course, Bazelon would be the last person to advocate internalization by psychologically intrusive mind control. Thus, his provocative internal/external dichotomy does not come to grips with the issues that need to be faced in formulating a model of morally permissible punishment. The legitimacy of such a model must rest on the content of the order for which compliance is sought, the qualitative character of the internal and external inducements that will always be found working in combination, and the political legitimacy of the authority that makes decisions about these issues.

The interesting part of Judge Bazelon's argument is not his preference for internal over external controls but rather his emphasis on morality over amorality, on fairness over efficiency. The dilemma is familiar. Punishment often has obvious deterrence advantages, even when its fairness can be questioned. Traditional illustrations include liability for mere negligence, liability for reasonable mistake of law, strict and vicarious liability, and doctrines easing the prosecutor's burden of proof. A central premise of the Bazelon position is that to be just, punishment must be not only efficient but fair, in the sense that the offender deserves it. That view closely mirrors conventional wisdom in a dominant tradition of criminal law scholarship.<sup>17</sup>

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15. Professor Stephen Morse has argued that those who take the external control approach do so because they accept a model of human behavior in which virtually all human action is *chosen*. It then becomes morally permissible to punish, regardless of the more complicated considerations of motive and opportunity that Bazelon addresses. See Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1249 (1976).

16. See, e.g., Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

17. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); H. PACKER, THE



Bazelon makes a useful contribution to the prevailing view by suggesting an important link between moral enforcement and efficient enforcement. That link is the mechanism of voluntary compliance. A criminal law that is basically fair will elicit public respect and adherence more readily than will a law that is harsh and out of touch with the prevailing sentiments of the community. Bazelon's "moral order" thus promises to beat "repressive order" on its own turf. Where repressive order requires heavy investment in police, prosecutors, courts, and prisons, voluntary compliance is cheap.<sup>18</sup>

I want to suggest that the link between moral order and efficient enforcement is stronger and more complex than Bazelon and others imply. First, there are major snags in the thread that connects moral order to voluntary compliance. Uncompromising insistence on the principle of no punishment without fault dramatically reduces the probability that factually guilty offenders will pay for their crimes. As that probability falls, confidence in the justice system and respect for its fairness diminish. Is compliance still an obligation of good citizenship if large numbers of individuals can commit the offense and avoid punishment? The voluntary compliance that a Bazelon system would elicit by its scrupulous fairness could easily be offset by the cynicism that its low probability of conviction would encourage.

A better way to see the link between morality and efficient enforcement is to look closely at the sanctions available in a strictly amoral system of "repressive order." There are, of course, the death penalty, imprisonment, fines, various forms of community service, intermediate confinement, and probation. Moral blame is not a necessary prerequisite to imposition of any of these disabilities.

One significantly different sanction is available. That is stigma, the expression of community condemnation that accompanies conviction of a serious criminal offense. This sanction is often forgotten in the enumeration of criminal penalties, but it is, I have argued, the most common sanction.<sup>19</sup> Because the amount of a fine and the restrictions of probation are often, by themselves, almost trivial disabilities, stigma turns out to be, in perhaps the majority of cases, the *only* significant sanction that the criminal justice system imposes.<sup>20</sup>

The importance of stigma in our sanctioning system is probably no accident. Stigma is economical. Unlike all other means of deterrence,

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LIMITS OF THE CRIMINAL SANCTION (1968); Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401 (1958).

18. In his book, Judge Bazelon includes a letter in which Professor Anthony Amsterdam forcefully makes a similar point: "The [desired] end is a safe, secure society . . . . That end is more efficiently attained . . . by encouraging citizen cooperation to law than by perfecting the means for apprehending and punishing the disobedient." P. 169.

19. Schulhofer, *Is There an Economic Theory of Crime?*, in *NOMOS XXVII: CRIMINAL JUSTICE* 329 (J. Pennock & J. Chapman eds. 1985).

20. *Id.* at 337-38.

it entails no expense beyond the costs for investigation, prosecution, and trial.<sup>21</sup> Stigma also differs from other penalties in that it is inextricably bound up with notions of moral fault. Fairness to the offender — a commitment to punishing only where blame can attach — becomes important to an efficient sanctioning system, because blame is essential to the stigmatizing effects of punishment, and stigma is, by far, the cheapest sanction to impose.<sup>22</sup>

The strict dichotomy between efficiency and fairness thus breaks down. A law enforcement model animated solely by an amoral commitment to efficiency must operate fairly, must (at least under most circumstances) regard moral fault as a prerequisite to criminal conviction. Otherwise, it dilutes or destroys the stigma from which it derives its least costly deterrent. Similarly, within a model of moral enforcement committed to punishing only those who are at fault, efficiency considerations have to be assigned some role as a constraint on how rigorously the fault constraint may itself be applied.<sup>23</sup> Ultimately, therefore, efficiency concerns and fairness concerns interpenetrate. The ostensibly opposed models are nested within one another.

The upshot is that we cannot choose an internal over an external perspective or a goal of fairness over efficiency. And it is equally impossible to make these choices the other way around. We must instead take a hard look at the fairness of get-tough policies, as well as their benefits (not always illusory) and their costs (including the dilution of stigma effects and the expense of more trials and longer incarceration). We must likewise take a hard look at the complex benefits and costs of ambitious social welfare expenditures. And the facile presumption of futility levied against the first (by liberals) must face the same scrutiny

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21. But to preserve stigma effects, the criminal justice process must insist on rigorous proof of fault, and a cumbersome system of adjudication results. From this perspective, stigma is not a costless sanction, but its costs are hidden and intertwined with the costs of rules and procedures adopted for other reasons. Fines could conceivably be a cost-free or even profitable sanction, at least for those offenders able to pay; but as presently administered, fines generally do not produce revenue adequate to cover collection costs.

22. See Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 68 (1988). For related discussion of the link between the blame requirement and the effectiveness of criminal law's stigmatizing function, see Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 LAW & CONTEMP. PROBS. 109, 111-12 (1986).

23. See *infra* text accompanying notes 74 & 87. To be sure, the overlap between efficiency and fairness is incomplete. Since the insistence on fairness in the efficiency approach is purely instrumental, fairness will be abandoned whenever its costs exceed its benefits. Increasing the system's emphasis on blame enhances the stigma inflicted upon conviction (a deterrence benefit), but it decreases the probability of conviction (a deterrence cost). And since an efficiency model is interested only in *perceived* fairness, it can seek to enhance both the severity of the stigma *and* the probability of conviction by increasing the perceived emphasis on blame, while decreasing the actual emphasis on blame. See generally Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Subtle, low-visibility shifts in the burden of proof, for example, can be a means of achieving the best (in efficiency terms) of both worlds.

as the equally facile presumption of futility levied against the second (by conservatives).

### B. *Individual Blame versus Social Blame*

In elaborating the requirements of fairness in punishment, Judge Bazelon insists on two principles: first, no punishment without a blameworthy choice, and second, no punishment — even when the actor *has* made a blameworthy choice — unless “society’s own conduct in relation to the actor entitles it to sit in condemnation” (p. 8). Society must make a substantial effort to eradicate the extreme deprivations that make it difficult for underclass defendants to live within the law. It must undertake a massive social welfare program before it can claim the moral right to punish the deliberate wrongdoer (p. 12).

Critics of the Bazelon position argue that punishment is legitimate whenever the offender had a fair opportunity to avoid criminal behavior. However strong the temptation to transgress, nearly all poverty-stricken defendants have a reasonable opportunity to comply with the law; the ability of most of their fellow ghetto-dwellers to remain law-abiding testifies to this. The decision to violate the law is thus a blameworthy choice that warrants punishment.<sup>24</sup>

Yet there is something plausible at the core of the Bazelon view. In part it is an implicit notion that a “clean hands” principle should limit the right of some to inflict suffering upon others. The notion has some of the same appeal (and some of the same problems) as the judicial integrity rationale for the exclusionary rule. To ground such a notion more solidly in a theory of just punishment would take us well beyond the tolerable boundaries of a book review. But I would suggest that part of the reason why it is right to punish the deliberate law-violator lies in the need to restore a social and moral equilibrium. Herbert Morris puts the point this way:

[I]t is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have — the benefits of the system — but by

24. See S. KADISH, *BLAME AND PUNISHMENT* 103 (1987); Morse, *supra* note 15, at 1251-54; Note, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987). Professor Kadish notes that the social deprivation defense may provide a fair vehicle for accusing society, but argues that “it is not a ground for excusing the deprived defendant, because by itself it fails to establish the defendant’s lack of responsibility.” S. KADISH, *supra* at 103. The assumption here might be that lack of responsibility is the only ground on which a defendant can argue that punishment is unjust. But such a move would assume away the very question that Bazelon wants to raise, because he argues that society cannot always claim the right to judge and punish the individual who has made a blameworthy choice. There are of course many instances in which misconduct by police or prosecutors may render it improper to punish a morally responsible offender. Presumably, therefore, Professor Kadish should not be read in this fashion. Rather, in keeping with the mission of his excellent book, he is addressing only the requirements of *blame* and arguing only that social fault “is not a ground for *excusing*.” So understood, his argument leaves open the possibility (urged by Bazelon) that punishment would be unjust on grounds other than those of “excuse.”

renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased.<sup>25</sup>

If Morris is right about the grounding of the moral right to punish, then we have to ask ourselves whether it makes sense to think about erasing an "unfair advantage" when the criminal law bears down upon the inner city underclass. Consider a few examples.

(1) A deprived, undereducated ghetto youth with no job and no prospects steals a gold watch or a ten-speed bike from a privileged suburban teenager. Can we say, with Morris, that "[m]atters are not even until this [unfair] advantage is in some way erased"?<sup>26</sup> The deterrence benefits of punishment are, of course, obvious, but the *legitimacy* of punishment is far from obvious within Morris's framework if the state is providing no "benefits of the system" to the disadvantaged.

(2) In many of our cities, drug treatment programs are oversubscribed and there are long waiting lists. Suppose that an addict waiting to enroll is charged with selling six grams of crack to an undercover agent, to help finance his habit. Does the addict's drug use, or the profits that he (temporarily) acquires by selling represent an "unfair advantage"? The addict has some free choice, and it is not impossible for him to abstain. But it is hard to say that society's behavior in regard to his predicament has no bearing on its moral right to punish.

Can we avoid the dilemma by assuming that the sentencing judge will take into consideration the addict's good-faith treatment efforts? Not necessarily. Congress, which balks at funding treatment programs at a level adequate to meet demand, has not hesitated to mandate stiff sentences for drug dealers. The charge of distributing over five grams of crack carries a mandatory minimum sentence of five years in prison with no possibility of parole.<sup>27</sup> The legitimacy of punishment is surely in doubt here even though the offender has chosen to do wrong under circumstances that left open an alternative course of action.

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25. H. MORRIS, ON GUILT AND INNOCENCE 34 (1976).

26. There is an important ambiguity in the "advantage" to which Morris refers. If he has in mind the offender's advantage vis-à-vis the victim, the claim becomes strained in the context of underclass Robin Hoods who steal from the rich. But Morris may have in mind the offender's advantage vis-à-vis other ghetto dwellers, most of whom continue to assume "the burdens of self-restraint." Here there is indeed an "unfair advantage," but does it justify punishment? Within the reciprocity framework that Morris develops, it is unclear why an advantage relative to other deprived or oppressed potential offenders supports the government's right to inflict punishment. I do not think that Professor Morris wants to argue for the justice of punishing the concentration camp inmate who steals from the authorities an extra crumb of bread.

27. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 1989 U.S. CODE, CONG. & ADMIN. NEWS (102 Stat.) 4370 (to be codified at 21 U.S.C. § 844(a)). Other severe mandatory minimum sentences, without possibility of parole, apply under the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.), and the Guidelines of the U.S. Sentencing Commission, § 2 D 1.1.

(3) A battered woman despairs after countless futile efforts to obtain police protection from an abusive spouse. She moves out but he relentlessly pursues her. Finally she kills her tormentor.<sup>28</sup> If the killing occurs when the husband is threatening only future injury, or present but not life-endangering injury, a claim of self-defense probably fails under prevailing standards. The battered spouse still has alternatives: to avoid taking life, she can submit to sadistic abuse; she can try once again to obtain police protection. In traditional terms, there is still a choice and therefore if she is sane, blame still attaches. But can a judicial system that was deaf to her pleas for help now fairly condemn and punish her? Police, court officers, and state funding authorities also had a choice. Should they not be condemning themselves?

The point of these examples is that the justice of punishment cannot rest solely on a demonstration of the defendant's fault. Just as government's right to punish the blameworthy depends on its compliance with fair procedures of investigation and trial, that right also depends on compliance with certain core imperatives of substantive justice. Low-level shortcomings of social policy should no more bar punishment than would contributory fault by a victim. But at a time of growing public enthusiasm for get-tough policies, Bazelon's emphasis on societal fault returns attention to the moral and practical value of more humane, constructive approaches to the causes of crime.

## II. THE INSANITY DEFENSE

Judge Bazelon's role in the evolution of the insanity defense is well-known. In 1954 he authored the controversial *Durham* decision, in which the D.C. Circuit abandoned *M'Naghten*<sup>29</sup> and ruled that defendants would be entitled to acquittal by reason of insanity whenever their acts were "the product of mental disease or mental defect."<sup>30</sup> There followed eighteen years of experimentation and agonizing frustration, as the D.C. Circuit struggled to realize *Durham*'s three principal objectives — freeing psychiatrists from artificial strictures on the form of their testimony, eliciting more information of better quality at trial, and entrusting the ultimate moral judgment about guilt to the jury rather than to the medical experts.<sup>31</sup>

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28. See, e.g., the case of Karen Straw, reported in *Queens Woman Acquitted in Slaying of Husband*, N.Y. Times, Oct. 1, 1987, at A1, col. 3. After repeated beatings, Straw filed criminal assault charges against her husband and obtained from Family Court an order of protection. She moved to a welfare hotel, but he pursued her, and her repeated calls for police assistance brought little response. One night he arrived uninvited, beat and raped her. The next day, after a violent argument, she grabbed a kitchen knife and stabbed him to death. In her prosecution for second-degree murder, the prosecutor argued that at the time of her attack, she was "the aggressor," and that she could have fled by the stairwell or elevator. The jury acquitted.

29. *M'Naghten's Case*, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

30. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

31. 214 F.2d at 870-76.

It proved a Sisyphean task. First, though the *Durham* formulation appeared supple and free of technical jargon, the dynamics of the adversary process soon turned "disease" and "product" into complex terms of art; psychiatric testimony was quickly obliged to conform to the new mold. Second, little real change in the quantity or quality of information was discernible; trial transcripts reveal expert testimony that dwells emphatically and repetitively upon labels but provides little or no information about the defendant's underlying mental and emotional situation.<sup>32</sup> Finally, the ultimate judgment about guilt had not been returned to the hands of the jurors at all; the crucial moral judgments were not thrashed out in the jury room but for all practical purposes were settled by the experts or even by divided vote at the psychiatric staff meeting.<sup>33</sup>

In *Brawner v. United States*,<sup>34</sup> the D.C. Circuit admitted failure and abandoned the *Durham* formulation. The majority chose to adopt the Model Penal Code (MPC) test: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."<sup>35</sup> Judge Bazelon, in a separate opinion, proposed instead that an accused should not be held responsible "if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible . . ." (p. 63).

At first glance there is considerable oddity about the majority's proposed solution to *Durham*'s problems. All of those problems had stemmed from two concepts at the center of the *Durham* test — disease and product. Yet the MPC test carries the same thorns, unconcealed and virtually unaltered. The crucial "disease" prerequisite retained its previous definition.<sup>36</sup> The "product" requirement was transformed into the requirement of a "result": hardly the harbinger of an epoch-making break with the past. To Bazelon, the whole operation seemed little more than a verbal trick.

In *Brawner*, the majority, ignoring Bazelon's warnings, pinned its

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32. See, e.g., *Washington v. United States*, 390 F.2d 444, 447-51 (D.C. Cir. 1967).

33. See *Blocker v. United States*, 274 F.2d 572 (D.C. Cir. 1959); Wales, *The Rise, the Fall, and the Resurrection of the Medical Model*, 63 GEO. L.J. 87, 91 (1974). The most striking episode was the infamous "weekend flip-flop" case, *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957). On Friday afternoon a St. Elizabeths psychiatrist testified that the petitioner (diagnosed as a sociopath) was not suffering from a mental disease or defect. Over the weekend, the St. Elizabeths staff decided that sociopathic personality did constitute a mental disease, and on Monday morning the witness changed his testimony accordingly. See *United States v. Brawner*, 471 F.2d 969, 978 (D.C. Cir. 1972).

34. 471 F.2d 969 (D.C. Cir. 1972).

35. 471 F.2d at 973.

36. See *infra* note 62 and accompanying text.

hopes for the new formula largely on experience.<sup>37</sup> However similar the verbal structure of the two tests, the MPC test apparently had not reproduced *Durham*'s difficulties in practice. A skeptic, however, might have attributed the relative success of the MPC test to circumstances of a more contingent character. The federal courts of appeals responsible for the trend toward the MPC did not (outside the D.C. Circuit) experience a typical mix of criminal cases. Murders, rapes, and other crimes of violence by mentally disturbed offenders made only a rare appearance on their dockets. Enthusiasm for the MPC test had been much less noticeable in the state courts, and jurisdictions that had adopted it often did not enjoy the District of Columbia's advantages (if that is what they were) in having a large, excellent public mental hospital and an exceptionally vigorous public defender organization.<sup>38</sup> The environment outside the District of Columbia was perhaps not calculated to give the MPC formulation its acid test.

The abandonment of *Durham* in this context presents an opportunity for an interesting test of the relative importance of legal doctrine and legal culture. The study has yet to be done, but most students familiar with the law-and-society literature would likely side with Judge Bazelon in doubting that *Browner*'s verbal overhaul would produce real change.

Preliminary observations suggest, however, that they would be (and that Judge Bazelon was) simply wrong. Surprisingly, the MPC test has "worked," at least in the sense that it seems to have raised none of the problems of administration that plagued *Durham*. So far as one can judge by the reported appellate decisions (an important caveat),<sup>39</sup> expert testimony has not been forced into artificial disease and result molds, a full flow of descriptive information has been available at trial, and there has been no sense of concern about experts usurping the jury's function. Only scattered cases have puzzled over the disease requirement and not a single one has involved a question about "product" or "result."<sup>40</sup>

How should one explain this success story? To start, one must note a major flaw in this test of doctrine versus culture: as is often the

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37. 471 F.2d at 980, 983.

38. On the other hand, District of Columbia indigents who were assigned counsel from the private bar often experienced woefully inadequate representation. Pp. 172-79.

39. The difficulties in administering *Durham*, however, were a constant preoccupation of the appellate courts, so that vantage point is important.

40. Judge Bazelon reports that in *Durham*'s first decade, the D.C. Circuit considered over a hundred insanity defense cases. P. 50. My own search found, for the period 1954-1972, 42 reported appellate decisions in the D.C. Circuit; many deal in detail with such central issues as the meaning of "disease" and "product." In contrast, for the post-*Browner* period of 1972-1988 there are, taking the D.C. Circuit and the D.C. Court of Appeals together, only 30 reported decisions, and more than one third of these deal only with burden of proof or other peripheral issues; only three cases deal with the "disease" requirement and none deals with "product" or "result."

case, the environment was not static. Increasing concern about crime and decreasing empathy for disturbed (and dangerous) offenders were gradually taking their toll on judicial appointments to the U.S. Court of Appeals for the D.C. Circuit. To compound the comparative problem, a jurisdictional change effective in 1971, and partially motivated by the same crime control sentiment, transferred the bulk of the D.C. Circuit's criminal jurisdiction to local, non-Article III courts in the District.<sup>41</sup> If for no other reason, the environment was different because for most purposes Judge Bazelon was no longer a part of it — his penetrating insight and his disturbing penchant for the probing question were excluded from the fray. It is no wonder (and perhaps no unmixed blessing) that the dust settled and that the appellate courts found much less to complain about.

This much said, doctrine itself appears to have had an impact. One can see, at least in retrospect, that the MPC's verbal formula changes the analytic structure of the insanity test. Under the MPC test, disease and the causal link between disease and conduct are merely prerequisites to consideration of a third issue — whether the impairment is substantial. In other words, under *Durham*, disease and product completed the case for exculpation, but there remains under the MPC test a third question, and this question of "substantial impairment" is inherently difficult to subsume in an expert, scientific conclusion.<sup>42</sup> As a result, trials under the MPC standard generate fewer definitional squabbles and less pressure to resolve them. In practice (so far as one can tell), testimony has been less preoccupied with labels and has provided better descriptions of the defendant's mental and emotional situation. The moral judgment about responsibility has more often been left to the sense of the community, acting through the jury.<sup>43</sup>

Proceeding from the same diagnosis of *Durham*'s defects, Judge Bazelon offered an alternative solution that reveals much about his general approach. His proposal would eliminate the disease and product limitations and instead ask simply whether the defendant's mental or emotional processes were so impaired that "he cannot justly be held responsible."

The logic of the position is straightforward. The insanity defense exists because "[o]ur collective conscience does not allow punishment where it cannot impose blame."<sup>44</sup> And our collective conscience does

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41. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 570 (codified as amended at 5, 18, 28 & 40 U.S.C.).

42. See *Betha v. United States*, 365 A.2d 64, 82-83 (D.C. App. 1976).

43. Perhaps the best documented example (though it was neither typical nor without problems) was the trial of John Hinckley. For one informative account, see A. STONE, LAW, PSYCHIATRY, AND MORALITY 77-98 (1984).

44. P. 48 (quoting *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945), cert. denied, 334 U.S. 853 (1948)).



not impose blame unless the actor "could reasonably have been expected to have conformed his behavior to the demands of the law" (p. 8). Bazelon sees the traditional elements of the insanity defense — whether expressed in terms of disease or product, impairment of cognition or control — not as boundaries but only as *illustrations* of the more basic principle that society should not punish where it cannot find a free choice.

This kind of extrapolation from a "core" principle runs a well-known danger of displacing worthy competing principles and essential constraints. The Bazelon approach to insanity, much like his approach to other problems in this book, overlooks several distinct sorts of problems.

First, and most obviously, the preference for jury decisionmaking under a broad standard disregards the familiar need to mix discretion with rules. While Bazelon is undoubtedly right that the traditional insanity defense is but an instance of a wider moral principle, setting the boundaries of that one instance (as traditional insanity tests do) provides a measure of uniformity and predictability unattainable with an open-ended standard.<sup>45</sup> Bazelon's assault on the requirements of disease, result, and substantial impairment reduces to a claim that the insanity defense is underinclusive. The objection is not unfounded but, standing alone, it is an almost trivial point; over- or underinclusiveness is an inevitable concomitant of any rule-based doctrine. The question always to be posed in connection with a claim of underinclusiveness is whether the advantages of more individually tailored justice are outweighed by the costs of greater discretion. But this is one question Bazelon never asks and consequently never has to resolve.<sup>46</sup>

A second problem grows out of the seemingly uncontroversial notion that punishment presupposes fault. This blame principle needs to be unpacked. Bazelon, in common with his critics, in effect translates the blame principle into two requirements. The first is substantive, associating blame with the decision of an individual who freely chooses to do wrong, when under all the circumstances she had the capacity to do otherwise (pp. 8-9). The second requirement is a process notion, associating blame with the judgment of moral condemna-

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45. The classic arguments for and against rules and discretion are catalogued in Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710-11 (1976).

46. Probably implicit in the Bazelon world view, and a corollary of his substantive commitments, is an assumption that the blame principle creates a dispositive tilt toward individualized discretion and away from rules. Any underinclusive formulation of excuse rules by hypothesis prevents some offenders from showing themselves blameless. Judge Bazelon might want to argue that the blame principle, as a deontological requirement, prohibits consideration of the "cost-benefit" trade-offs involved in the choice of rules over discretion. Cf. p. 27: "[I]ndividualization is a prerequisite to a moral system of criminal justice." In accord with this view, Judge Bazelon has also argued that the jury should be told of its power to nullify legal rules by disregarding the judge's instructions on the law. *United States v. Dougherty*, 473 F.2d 1113, 1139-44 (D.C. Cir. 1972) (dissenting opinion).

tion expressed by the existing social community, speaking through the jury (*see, e.g.*, pp. 49, 57). But is this second requirement congruent with the first? If not, which governs?

Community standards of fault could conceivably constitute the sole metric for determining moral blame and eligibility for punishment. Bazelon probably goes as far as any prominent commentator in urging precisely this position.<sup>47</sup> But community notions of blamelessness are at times too generous for rational penal policy.<sup>48</sup> Conversely, the community is often too ready to condemn when a detached evaluation would find no effective choice and hence no rational basis for blame.<sup>49</sup> We have, in consequence, a variety of jury control devices. Such devices are designed to effectuate a morality whose contours are shaped not only by more general sources of the popular will, but also by the kinds of standards that always can be brought to bear in criticism of the norms and practices of an existing community. The complex interplay between jury prerogatives and jury-control devices expresses a tension that pervades criminal law, a tension between the working, popular morality of everyday life, and the more elaborate critical morality that is rooted in criteria constantly tested for their generality, consistency, and responsiveness to relevant social goals.<sup>50</sup>

Bazelon's willingness to identify fault with the notions of blame held by ordinary members of the community, as expressed through the jury, overlooks the need to temper popular morality with articulated, consistent principles. One can only guess whether Bazelon thinks that deference to community intuitions in the insanity area would more often favor prosecution or defense. Perhaps he would say that it does not matter. But one can easily imagine juries willing to acquit despite facts sufficient to satisfy the critical requirement of free choice.<sup>51</sup> The converse situation is more likely in the case of violent crimes: What should happen under the Bazelon approach if, in the face of compelling evidence of major mental disability, the jury nonetheless convicts?

Consider the case of Steven Green,<sup>52</sup> a severely disturbed youngster whose uncontrollable behavior was evident from the time he was seven years old. He experienced acute problems in school, received

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47. *See United States v. Dougherty*, 473 F.2d 1113, 1139-44 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (urging that the jury be informed of its power to disregard the judge's instructions and to acquit in spite of the evidence).

48. *See, e.g.*, H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 242-57 (1966) (discussing the prevalent jury attitude toward contributory fault of the victim).

49. *See, e.g.*, *State v. Green*, 643 S.W.2d 902 (Tenn. Ct. App. 1982), discussed *infra* at text accompanying notes 52-55.

50. *See* H.L.A. HART, *LAW, LIBERTY AND MORALITY* 20 (1963); Schulhofer, Book Review, 68 CALIF. L. REV. 181, 196-200 (1980) (reviewing G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978)).

51. The problem arises most directly in connection with efforts to invoke the jury's nullification power. *See supra* note 47 and accompanying text.

52. *See State v. Green*, 643 S.W.2d 902 (Tenn. Ct. App. 1982).

psychiatric help from an early age and had in-patient hospital treatment until his parents' health insurance ran out. Because of delusional thinking, unwillingness to bathe, and inability to order his life, Green eventually dropped out of school, was discharged from the Navy, and became estranged from parents and relatives who attempted to help or at least house him. By age eighteen he was living in the parks and streets of Chattanooga, when police were not arresting him for vagrancy or forcing him to move on. In January 1979 he contacted the Chattanooga FBI and sought their protection from an evil New York scientist who, Green thought, was controlling his mind waves by a device he called an "ousiograph." The FBI perceptively concluded that Green had mental problems and suggested that he go to a hospital for help. A few weeks later, in a park rest room where Green had previously sought shelter from the cold, he confronted a policeman, somehow managed to grab the officer's service revolver, and shot and killed him. In the face of overwhelming evidence of mental illness,<sup>53</sup> a rather liberal insanity formula (the MPC test), and a requirement that the prosecution prove sanity beyond a reasonable doubt, the jury convicted Green of first-degree murder.

How would Steven Green fare under the Bazelon approach? Would a jury freed of the "strictures" of the MPC test be more likely to acquit? Beyond question, the jury that convicted Green would have reached the same conclusion no matter how the insanity instruction was worded. In that event, what would have been Judge Bazelon's decision on appeal? Once the jury, as the voice of the community, decides that a defendant can "justly be held responsible," it is difficult to imagine how an appellate court can presume to find the judgment erroneous. The condemnation of Green necessarily would stand.<sup>54</sup> Under the MPC test, in contrast, the appellate court had the opportunity (and the obligation) to consider the relationship of the test's elements to the facts proven at trial. The court held, in my view correctly, that the undisputed evidence established substantial impairments of both cognition and control and that Green therefore was insane as a matter of law.

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53. Green had an extensive history of severe mental disability predating the offense. Every mental health professional who had contact with him, before or after the killing, agreed that he was acutely psychotic at the time of the offense and that he could not possibly be "faking" his symptoms. One doctor stated that "he has been psychotic for most of his life, if not all of his life." 643 S.W.2d at 911. The state's evidence for sanity consisted of the testimony of five police officers and one county employee, who described Green as "cooperative," "coherent," or "intelligent" and reported observing no signs of bizarre behavior. But one of the state's witnesses, the arresting officer, apparently told a defense attorney that Green was "crazy as a loon." 643 S.W.2d at 909.

54. "The jury's unique qualification for [evaluating mental impairment in light of community standards of blameworthiness] justifies our unusual deference to the jury's resolution of the issue of responsibility." P. 62 (citing *United States v. Eichberg*, 439 F.2d 620, 624-25 (D.C. Cir. 1971) (Bazelon, C.J., concurring)).

There may be room for debate about the proper meaning of the cognition and control requirements in the context of a case like *Green*.<sup>55</sup> But the Bazelon approach would preempt any such discussion by unqualified deference to the popular morality, a morality that is, by definition, wholly intuitive, unreflective, and undetached from the volatile emotions surrounding, for example, the death of a police officer in the line of duty. By emphasizing discretion over rules and popular over critical morality, the Bazelon approach wipes out not only the procedural basis for jury control but its substantive *raison d'être*.

The third problem with the Bazelon approach to insanity is in some ways the opposite of the previous one. Just as a jury reflecting popular sentiment may convict when the critical morality cannot assign blame, juries may take broad, unbounded insanity instructions literally and render inappropriate acquittals. They may, in other words, faithfully respect the blame principle but give too little weight to the social protection function of the criminal law. Viewed from this angle, the critical defect in *Durham* was not the relatively technical matter of expert testimony or the definition of terms, both issues on which the D.C. Circuit lavished extraordinary attention. Rather, it was the boundary problem — whether *Durham* set out a workable and sufficiently tight *restriction* on the nonresponsibility defense. Although Bazelon ascribed the difficulties to the illogic of the various limitations and sought to remove them all, the heart of the problem was that “disease” and “product” did not provide limitation enough.

From the beginning there was a recognition in post-*Durham* cases that a common-sense, literal interpretation of disease and product would cast the exculpatory net too wide. There was therefore an assumption that these terms must imply some boundary. In the early cases lawyers and psychiatrists seemed to assume that the boundary lay somewhere in the disease concept — every mental or emotional abnormality could not be full-fledged “disease.” Mere neurosis or personality disorder presumably would fail to qualify. The result was the trial-by-label so much derided by both Bazelon and his colleagues.

When the D.C. Circuit largely ended labelling battles over “disease” by giving it a flexible legal definition,<sup>56</sup> the story was repeated in litigation about “product.” If the disease concept could no longer

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55. Cf. *State v. Lawton*, 734 P.2d 1138 (Kan. 1987); *People v. Weber*, 170 Cal. App. 3d 139, 215 Cal. Rptr. 827 (1985), both holding that testimony describing episodes of “normal” behavior was sufficient to support jury verdicts of sanity, despite extensive and essentially uncontradicted expert testimony of profound psychosis. Courts in such cases tend to duck, as a mere problem of jury deference, what is in reality a core substantive question, namely the moral responsibility of a person whose capacity for rational action is quite normal in some areas of behavior but grossly impaired in others. A suggestive analysis appears in H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 137-42 (1972).

56. See *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962).

serve the boundary function, something else would have to do so in its stead. The product element, once viewed as a simple "but for" requirement,<sup>57</sup> had to be reined in. Product now meant *proximate* cause (p. 57). But how should "proximate" be defined? The court offered no criteria. Psychiatrists debated productivity; trial-by-label continued; experts, lawyers, and lay fact-finders continued to struggle for the power of decision. Once again, the D.C. Circuit intervened,<sup>58</sup> though the effort to prevent expert dominance and conclusory labelling seemed an attempt at "stopping the tides."<sup>59</sup>

Unfortunately, even in *Browner* both Bazelon and the judges who favored the MPC test continued to focus on symptoms and failed to appreciate *why* their efforts had been unsuccessful. *Durham* had failed because it did not articulate a boundary for the nonresponsibility defense. It reflected no willingness to qualify Bazelon's blame principle by an imperative to insure that the public safety would not be imperiled. The prevailing rules about burden of proof and civil commitment exacerbated this problem.<sup>60</sup> The MPC test is not radically different in this regard. As a result, when the Hinckley acquittal riveted public and professional attention on the boundary problem, the Bazelon-Leventhal debate over whether to choose MPC or a *less* specific formulation quickly became academic.

Today the questions lie elsewhere — whether to require defendants to bear the burden of proving insanity, whether to raise the "mental disease" threshold, whether to preclude defenses based on impairment of control, whether to abolish the insanity defense altogether. Because Judge Bazelon had no occasion to enter these contemporary debates, the republication of his insanity defense writings holds little interest for those inclined to focus solely on the topical. The underlying boundary problem continues to plague us, but not for the reasons that absorbed his attention. The same dynamic, examined in the next section, is at work in Judge Bazelon's aggressive disdain for the boundary problem in fixing the extent of all the criminal law excuses.

### III. BOUNDARIES OF THE CRIMINAL LAW EXCUSES

*United States v. Alexander*<sup>61</sup> involved murder charges growing out of a racially charged confrontation. Three blacks were sitting in a

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57. *Carter v. United States*, 252 F.2d 608, 615-17 (D.C. Cir. 1957).

58. *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967).

59. *United States v. Browner*, 471 F.2d 969, 983 (D.C. Cir. 1972).

60. *See, e.g., Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968) (Bazelon, C.J.), holding that after an acquittal based on reasonable doubt as to sanity, a defendant may not be civilly committed, absent a new hearing at which the government proves both dangerousness and insanity. Defendants who were neither demonstrably sane nor demonstrably insane could not be convicted or civilly committed. The Supreme Court has since taken a different view. *See Jones v. United States*, 463 U.S. 354 (1983).

61. 471 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 1044 (1972).

hamburger shop when five white Marine officers, all in dress uniform (and unarmed), entered to order take-out food. The time was June 1968, just two months after the assassination of Martin Luther King. Murdock and one of the other blacks left the restaurant, but the third, Alexander, exchanged sharp words with a Marine who Alexander apparently thought was blocking his path. A second Marine approached, taunting Alexander as a "dirty nigger bastard." Murdock returned to assist Alexander. Hearing someone say, "Get out, you black bastards," and seeing a Marine advance towards him, Murdock pulled a gun and opened fire, killing two of the officers.

At trial Murdock raised an insanity defense, but he confronted a tactical dilemma. His psychiatric expert described Murdock's volatile emotional state, his strongly delusional (but not psychotic) thinking, his preoccupation with the unfair treatment of blacks, and his conviction that a racial war was inevitable. The expert linked Murdock's condition to a troubled childhood in a broken family and a ghetto environment. But the expert also stated firmly that Murdock's condition did not amount to a "mental disease or defect."

In an effort to avoid having to challenge his own witness on this last and crucial point, defense counsel sought to have the phrase "mental disease or defect" deleted from the insanity instructions. In the context of this trial, the proposal did not require any significant departure from prevailing law. District of Columbia cases had already held that "mental disease" was a legal, not a psychiatric concept. And the jury could easily have found facts sufficient to satisfy the legal definition of disease, namely "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."<sup>62</sup> Counsel simply sought instructions that would delete the "mental disease" rubric while leaving the substance of the required factual findings unaffected. He also argued to the jury that the reason for Murdock's lack of control was a deep-seated emotional disorder rooted in his "rotten social background" (p. 110).

The trial judge denied the requested instruction but properly stressed that "mental disease" was a legal concept and that the jury was not bound by the medical conclusions. He also cautioned the jury that it was "not concerned with a question of whether or not a man had a rotten social background."<sup>63</sup> Murdock was convicted of second-degree murder, and the D.C. Circuit, over Judge Bazelon's dissent, affirmed.

For Judge Bazelon, *Alexander* affords an occasion for a wide-ranging commentary on the boundaries of criminal law excuses. His first argument for reversal centers on the view that the judge's comment about "rotten social background" had the effect of telling the jury to

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62. *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962).

63. P. 110 (quoting *United States v. Alexander*, 471 F.2d at 959).

disregard evidence that had a direct bearing on "mental disease" as defined under existing law (p. 111). But Bazelon quickly proceeds beyond this narrow lawyer's point to consideration of why "mental disease," in any sense of the term, should limit the availability of a defense. To Bazelon, the disease requirement is an "illogical limitation[]" (p. 113) that "deflect[s] attention from the crucial, functional question — did the defendant lack the ability to make any meaningful choice of action . . ." (p. 112).

The Bazelon position in *Alexander* reflects the logic of his opinion in *Browner*, written the same year. The traditional requirement that impairment be the result of mental disease is, for Bazelon, merely a convenient generalization about one of the circumstances in which our collective conscience cannot impose blame. If it is unjust to punish a person who is unable to control his conduct because of mental disease, then it must be equally unjust to punish a person who experiences the same inability for some other reason, including "rotten social background" (hereinafter "RSB"). The moral imperative to excuse arises from the absence of the capacity for free choice. The reason for the impairment cannot, absent a self-inflicted or avoidable incapacity, be relevant in the moral equation.

Having raised this provocative suggestion, Bazelon quickly points out the difficulties. Defendants who lack substantial capacities for self-control are, by definition, dangerous. Indeed Bazelon describes Murdock as "a man whose bitterness and racial hostility have turned into blasting powder which can be touched off by a spark" (p. 113). We can hardly welcome the prospect of an unqualified acquittal that returns such a person to the streets. Defendants found insane in the traditional sense do not present this problem because they will be committed until they recover their sanity or are no longer dangerous. But such commitments, at least as presently practiced, require a finding of mental illness. Unless the emotionally explosive product of a "rotten social background" can be found insane in the traditional sense, the mental hospital would have to release him. What, then, should be done?

Bazelon offers four possible answers to this question. First, we can accept current law's "admittedly illogical" limitation on the defense of nonresponsibility (p. 113). Defendants like Murdock who lack the power of self-control will be convicted anyway, despite their lack of moral fault, and confined in prison. This solution avoids the difficult dispositional issues, but at the cost of breaking faith with the principle of no condemnation without blame.

Second, we can acquit the defendant, release him from the hospital, and return him to the streets. This solution keeps faith with the premises of both criminal responsibility and civil commitment. Its difficulty lies in its appalling implications for public safety: the walking

powder keg can easily explode again, perhaps frequently. Bazelon recognizes that this prospect would make it "difficult to obtain public support for" acquittal and release (p. 114), but he stops short of saying that the solution is undesirable in principle. On the contrary, he tries to lend plausibility to acquittal and release by incorrectly analogizing the RSB defendant to one released by application of the fourth amendment exclusionary rule.<sup>64</sup> In a seemingly reluctant concession to political reality, he concludes only that "while there may be no reason in logic why Murdock could not be returned to the street, as a practical matter that is probably [!] an unfeasible result" (p. 114).

Third, we could stretch the medical model, find some "vaguely therapeutic purposes" applicable to RSB cases, and use those purposes as a pretext for hospitalization. Aversive conditioning might help "reprogram" violent behavior. But Bazelon recognizes that such treatment raises "profound moral and legal questions" (p. 115). Without ruling out a move in this direction, he cautions that we must "scrutinize with care [its] implications" (p. 115).

Finally, if we cannot cure an RSB defendant and are unwilling to release him, we are left with confinement on the basis of predicted dangerousness. This solution, described as "nothing more or less than unadorned preventive detention," raises for Bazelon another set of "profound moral and legal questions" (p. 115). The confinement solution is in fact less offensive than one might infer from Bazelon's attempt to identify it with preventive detention. Moral objections to preventive detention largely center on its disregard for personal autonomy. Individuals are confined not on the basis of choices they have made but solely on the basis of predictions about a choice that they, or most persons similarly situated, are considered likely to make. Disapproval of preventive detention reflects our commitment to the moral autonomy of the individual and a desire to strengthen personal responsibility by teaching that people are accountable for (and only for) their freely willed choices. Confinement of the mentally ill is not at odds with these principles because its premise is the patient's lack of autonomy and incapacity to make a genuine choice. The same can be said

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64. Bazelon writes:

[T]here are even precedents for the acquittal and release of dangerous defendants . . . . The Fourth Amendment exclusionary rule, for example, effectively preclude[s] conviction of some defendants who appear to be dangerous . . . . [That rule] serves important extrinsic interests — the redress and deterrence of unconstitutional action and the preservation of judicial integrity. Acquitting a defendant like Murdock and returning him to the street might also protect our integrity.

P. 114.

This passage overlooks important distinctions. The defendant who benefits from the exclusionary rule remains subject to conviction for past behavior, if legally obtained evidence is available. And his future behavior remains deterrable; if his dangerous propensities materialize again, he can be convicted and incarcerated. In contrast, the RSB defendant would remain on the streets indefinitely, no matter how serious or frequent his misconduct and no matter how much evidence could be legally obtained against him.



of the RSB defendant who lacks the capacity for self-control. Confinement in these special circumstances lacks one of the major objectionable features of generalized preventive detention.

Despite this qualification, Bazelon is surely right that confinement of RSB defendants (whether in the guise of a therapeutic or a preventive model) would pose troublesome issues. Indeed, Bazelon provides an excellent summary of the dilemmas. He notes that every effort to diminish the class of persons who can be found criminally responsible will probably produce a concomitant expansion of the class of persons subject to involuntary commitment and that, once authorized, preventive confinement probably would not be restricted to those RSB individuals proved to have committed dangerous acts. The detention device thus unleashed would operate "at the exclusive expense of the lowest social and economic class" (p. 116).

What then are we to do? Characteristically, Bazelon has provided, in each of his four "answers," only a series of further questions. The problems are so monumental that he appreciates the temptation to give up. Maybe, he says, it would be better to accept the medical boundary to the nonresponsibility defense, despite its "illogic" (p. 116), in order to avoid confronting so many difficult issues. But, on the other hand, this approach deprives us of a "free flow of information" that could enable us to "begin to learn something about the causes of crime" (p. 116). His chapter on *Alexander*, just like the opinion written fifteen years before, suggests no reconciliation of these conflicts, offers no bottom line.

At the core of Bazelon's argument is the claim that we cannot maintain both the principle of no punishment without fault and the medical boundary to the nonresponsibility defense. The prevailing wisdom denies this dilemma by reaffirming the fault requirement but asserting that punishment of the RSB defendant does not violate it. Thus Professor Stephen Morse finds "no disagreement on the fundamental moral principle that 'the law should not convict unless it can condemn'"; similarly he finds broad agreement that condemnation requires that the actor "could reasonably have been expected to conform his behavior to the law."<sup>65</sup> Yet Professor Morse argues that RSB defendants do not lack free choice. Conceding the high likelihood that they will commit a crime, he notes that all of us at times confront harder or easier choices. The person living in a criminogenic subculture faces great pressures and *very* hard choices, but he still is capable of choice.<sup>66</sup>

Professor Sanford Kadish concurs: Punishment of the RSB defendant is not inconsistent with the blame principle because a criminogenic environment, however strongly it may explain or predict

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65. Morse, *supra* note 15, at 1248-49.

66. *Id.* at 1251-52.

violent behavior, "fails to establish the breakdown of rationality and judgment that is incompatible with moral agency."<sup>67</sup> Professor Kadish continues:

It may be conceded that cultural deprivation contributed to making the defendant what he is (though, of course, only some RSB victims commit crimes). But what is he? He is a person with wrong values and inclinations, not a human being whose powers of judgment and rational actions have been so destroyed that he must be dealt with like an infant, a machine, or an animal.<sup>68</sup>

I am not sure that Bazelon's dilemma can be so readily avoided. Indeed these thoughtful scholars seem to miss the thrust of his point. Bazelon is not arguing that all products of a ghetto neighborhood lack criminal responsibility or that those highly likely to offend should, *for that reason*, have an excuse. The person whose "powers of judgment and rational actions" remain intact is not one for whom Bazelon seeks a defense. Rather, he claims only that responsibility is lacking in the subcategory in which the jury is prepared to find that, because of his criminogenic background, the defendant "lack[ed] the ability to make any meaningful choice of action" (p. 112). If lack of capacity for self-control defeats responsibility when due to mental illness, as it does under the MPC insanity test,<sup>69</sup> or if "[b]izarre, senseless and unintelligible motivations [of the mentally ill] may manifest lack of moral agency even where the person is literally aware of what he is doing,"<sup>70</sup> as Professor Kadish persuasively maintains, then the same incapacity should also defeat responsibility when its cause is social or economic.

My response to Judge Bazelon is different. I believe we are compelled to recognize that the blame principle, in its traditionally accepted form, badly needs qualification.

Part of the problem grows out of the tension between popular and critical moralities already examined in connection with the insanity cases. Judge Bazelon too readily assumes either that the community judgment will accord with critical criteria of fault or that, if not, the former should control the latter: An intuitive jury willingness to acquit should prevail even when close analysis suggests that the defendant did have the capacity for free choice. Professor Kadish, in contrast, may be understood as saying that the RSB defendant should

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67. Kadish, *supra* note 24, at 103.

68. *Id.*

69. § 4.01(1) provides that a person is not responsible for his conduct when "he lacks substantial capacity . . . to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962).

70. Kadish, *supra* note 24, at 101. The deductive logic of Judge Bazelon's case for an RSB defense weakens considerably if control impairments are excluded from the insanity defense even when due to mental disease. *E.g.*, United States v. Lyons, 731 F.2d 243 (5th Cir.), *cert. denied*, 469 U.S. 930 (1984). Bazelon could still argue, however, that social and economic oppression might produce in a person like Murdock the "bizarre, senseless and unintelligible motivations" that would manifest cognitive impairment or (for Professor Kadish) a lack of moral agency.

not be acquitted because he will never (almost never?) lack free choice, *even if the jury should find otherwise*. And one could conceivably hold this view, even while concluding that jury judgments about free choice can be trusted (*i.e.*, can be expected to accord with the conclusions of a critical morality) when mental illness, with its more easily recognized symptoms, is at issue.

The first qualification to the fault principle, then, is that community intuitions about blame should not control when they are likely to diverge too often or too sharply from the requirements of a consistent, principled morality. Once brought to the surface, this qualification is by no means novel.<sup>71</sup> Nor is it unproblematic, implying as it does a kind of "elite" morality severed from the detail and texture of social life. The appropriate domains of popular intuition and critical principle are difficult to locate, but no modern system can rely on one or the other exclusively.

The second qualification relates to the substantive dimension of the blame principle — the notion that punishment requires blame and that blame presupposes the existence of free choice. Some claims are more elusive, more difficult to verify than others. So resolution of some kinds of claims may entail an especially high rate of error. This is particularly the case with respect to the RSB issue and, it is said, with respect to other claims of impaired control.<sup>72</sup> But the fault principle leaves little or no room for concern about error. The prerequisite to punishment is proof of fault, proof beyond a reasonable doubt. Any uncertainties, any inabilities decisively to refute a defensive claim, leave us in doubt about fault and hence morally disabled from punishing.<sup>73</sup> Judge Bazelon's uncompromising adherence to this version of the fault principle collides not only with the medical boundary of the insanity defense, but with many other features of existing doctrine relating to mens rea, excuse, and the burden of proof. Existing doctrine may well be excessively concerned about error costs and far too ready to accommodate administrative and evidentiary needs. But however strong one's preference for the fault principle, one cannot plausibly exclude efficiency considerations and problems of verification

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71. Among the best discussions of the tension involved in our desire to draw on, but control, jury sentiments is M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* (1973). Judge Bazelon's views, which tilt sharply toward the former branch of this dilemma, are most explicitly set out in *United States v. Dougherty*, 473 F.2d 1113, 1138-44 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part).

72. See *United States v. Lyons*, 731 F.2d 243 (5th Cir.), *cert. denied*, 469 U.S. 930 (1984).

73. See *Lyons*, 739 F.2d at 994, 997-98 (supplement to 731 F.2d 243) (Rubin, J., dissenting): [T]he absence of useful expert evidence, if indeed there is none, does not obviate the need for resolving the question whether the defendant ought to be held accountable . . . Our duty to undertake that inquiry is not based on confidence in the testimony of expert witnesses, but on the ethical precept that the defendant's mental state is a crucial aspect of his blameworthiness.

entirely.<sup>74</sup>

A further problem lurks in the fault principle, and it is perhaps less often admitted than the familiar need to balance fairness against efficient fact-finding. The problem can be illustrated by another boundary problem in the law of excuse — the treatment of control impairments resulting from alcohol or drug addiction. Consistent with his position with respect to RSB, Judge Bazelon would hold that an addict lacking the capacity for self-control would have a defense to drug use and even to violent crimes, whether or not his addiction amounts to a “mental” disease.<sup>75</sup> Existing law is uniformly to the contrary.<sup>76</sup> But why treat drug addiction differently from “mental disease”?

There are essentially three answers, all unsatisfactory in my view. The first asserts that the drug addict simply does not lack the capacity for self-control.<sup>77</sup> There is much evidence to support this view, which may be accurate in general, but this answer leaves unclear why the issue should be resolved conclusively in the law journals or the appellate courts when a defendant offers to show at trial that the claim is inapplicable to his particular case.<sup>78</sup>

The second argument for disallowing a drug addiction excuse is that the kind of evidence required to establish or negate addiction is simply too elusive or unreliable. This error-cost argument is particularly stressed by Judge Leventhal in *United States v. Moore*.<sup>79</sup> But every one of the reasons Judge Leventhal cited to show the unreliability of addiction evidence could be applied, in spades, to evidence of mental illness.

The third argument, forcefully presented by Professor Kadish, parallels his discussion of RSB. Drug addiction does not negate moral

74. See S. KADISH, *supra* note 24, at 91-93.

75. *United States v. Moore*, 486 F.2d 1139, 1260 (D.C. Cir.) (Bazelon, C.J., concurring in part and dissenting in part), *cert. denied*, 414 U.S. 980 (1973).

76. *E.g.*, *Moore*, 486 F.2d at 1139; *cf.* *State ex rel. Harper v. Zegeer*, 296 S.E.2d 873 (W.Va. 1982) (holding that punishment of alcoholics for public intoxication violates state constitutional prohibition against cruel and unusual punishment, but stating that alcoholism is no defense to nonspecific intent crimes committed while drunk).

77. See, *e.g.*, S. KADISH, *supra* note 24, at 105-06; J. KAPLAN, *THE HARDEST DRUG* 21-22, 35 (1983).

78. Much of the evidence for the weakness of the addict's craving is based on recent experience with heroin and reflects the low concentrations of that drug now generally available on the street. The conclusions could well be inapplicable to users addicted to high heroin concentrations, see J. KAPLAN, *supra* note 77, and they seem wholly inapplicable to crack, which is said to be quickly and powerfully addictive. The view that the addict has substantial capacity for self-control also reflects the assumption that “gradual withdrawal under professional care . . . is widely available.” S. KADISH, *supra* note 24, at 106; Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 436-37 (1975). Recent reports are often to the contrary on this last point. See, *e.g.*, *A Good Way to Fight Drugs and AIDS*, N.Y. Times, Dec. 8, 1988, at A34, col. 1 (In New York City, “[a]ddicts seeking help often wait for months.”).

79. 486 F.2d 1139, 1183-85 (D.C. Cir.) (concurring opinion), *cert denied*, 414 U.S. 980 (1973).

agency because the addict's motivations remain perfectly intelligible and his capacity for rational action remains unaltered.<sup>80</sup> This argument amounts to a claim that the law should not recognize control impairments as exculpatory, whether or not they result from disease. Indeed, Professor Kadish makes precisely that claim.<sup>81</sup> But where the law does recognize impaired control as a basis for the insanity defense, as in the MPC or irresistible impulse formulations, the Kadish view suggests no basis for treating differently the drug addict's problem of self-control.

Apart from this problem of consistency with extant law, the argument for the moral accountability of all drug addicts is troublesome on its merits. This view of the conditions sufficient for moral agency would exclude most cases of "irresistible impulse" from the domain of the excuses. A person like Gorshen,<sup>82</sup> who is so overwhelmed by anger that he shoots his tormentor while police stand literally at his elbow, apparently would have to be judged a moral agent criminally responsible for his actions.

It may be difficult (or impossible) to separate those who can't from those who won't, yet the verification problem, so heavily stressed in the recent attacks on volitional tests,<sup>83</sup> may have been overstated.<sup>84</sup> But this conception of moral agency is not based on evidentiary concerns. It claims instead that even assuming we *know* that the actor "can't," he is nonetheless a responsible moral agent if his actions are rationally related to intelligible purposes. This view collides with the intuitive appeal of the irresistible impulse defense, which has enjoyed longstanding and reasonably common (though by no means universal) acceptance, and with the clear signals that recent rejection of control-

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80. S. KADISH, *supra* note 24, at 104: "There is nothing irrational in the conduct of a person who engages in addictive behavior . . . Nor is there anything bizarre or unintelligible in the desire to achieve either the gratification the conduct affords . . . or the avoidance of the negative effects of not gratifying the desire."

81. *Id.* at 101-02.

82. *See* *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

83. *See, e.g., Bonnie, The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983). *See also infra* note 85.

84. There is typically a marked difference in the feelings of the person who acts on a desire because he *wants* to gratify it, and the feelings of the person who wants to resist but cannot. As the latter person resists or denies the desire, there is often an experience of rising tension or anxiety that can produce considerable distress. Professor Fingarette has observed that "no one has ever observed such processes "of losing self-control" and "no one can." H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 160 (1972), *cited in* *United States v. Lyons*, 731 F.2d 243, 248-49 n.11 (5th Cir. 1984). But, as Professor Fingarette has also written, "[a]nyone who has ever observed the behavior of a chronic heavy drinker cannot help feeling a sense of powerful momentum at work." H. FINGARETTE, *HEAVY DRINKING* 32 (1988). Courts and commentators unsympathetic to the volitional defenses need to pay closer attention to the possibilities for identifying symptoms of the control disorders, and of verifying such symptoms retrospectively when the first psychiatric contacts occur well after the offending conduct (a serious problem in all insanity defense cases).

based insanity claims reflect evidentiary concerns almost exclusively.<sup>85</sup> The view is, moreover, foreign to the experience of any sincere but unsuccessful dieter who has succumbed to a chocolate fudge brownie. To deny, as a matter of principle, any difference between those who cannot and those who will not (or to assert the personal blameworthiness of the former) is to deny a subjective reality that most of us have at one time experienced, to our own frustration and chagrin.<sup>86</sup>

I submit that a different concern is at work here. The problem is not just that we may be fooled into finding control incapacities that do not really exist. Rather, the concern is also that in too many cases, the claimed impairment of self-control will be valid and demonstrable. Genuine incapacities due to mental disease seem to be infrequent, but incapacity due to alcohol or drug addiction could be common enough to pose a major dispositional problem. If defendants incapable of self-control cannot be convicted, they would have to be committed (without the penal "stigma") or released. As Bazelon himself indicates in his discussion of the RSB problem, neither alternative works well when the control incapacity is not the result of mental disease. Like RSB, drug addiction has been placed outside the boundaries of excuse in part because of the dangers for public safety implied by rigorous respect for the fault principle in this context.

Thus, a third qualification to the fault principle must be admitted, much as commentators have hesitated to pronounce it out loud. We do not (and, I would argue, cannot) pursue the fault principle to the point at which it would pose a major threat to the social protection function of the criminal law.<sup>87</sup>

This last qualification to the fault principle is, unfortunately, capa-

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85. In rejecting the volitional branch of the MPC insanity test, *United States v. Lyons*, 731 F.2d 243 (5th Cir.), *cert. denied*, 469 U.S. 930 (1984), makes the following points: psychiatrists do not have "sufficient accurate scientific bases for *measuring*" self-control or the degree of impairment; there is "no *objective* basis for distinguishing" those who can't from those who will not; satisfying the requirement of proof beyond a reasonable doubt is "an all but impossible task in view of the present murky state of medical knowledge." 731 F.2d at 248-49 (emphasis added).

86. To establish the blameworthiness of the drug addict and others who allegedly cannot control their conduct, Professor Kadish relies on the concept that a moral agent is a person with a capacity for rational action in light of intelligible motivations. *See supra* note 80. But even within this framework, the conclusion that the drug addict is a moral agent remains debatable. Professor Michael Moore, whose work on the concept of moral agency plays an important role in Kadish's analysis, reaches the opposite conclusion with respect to behavior that is affected by irresistible impulse or the addictions. Moore argues that in such cases moral agency may be lacking because the person's "capacity to follow the normal dictates of reason is interfered with . . . [by] extreme emotion or cravings." Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1130 (1985). *See also* M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 86-90 (1984).

87. The courts are sometimes willing to make this concern explicit. It occupies a central place in Judge Wilkey's plurality opinion in *United States v. Moore*, 486 F.2d 1139 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973). Although Professor Kadish believes it unnecessary to fall back on this qualification to account for the rejection of addiction and RSB defenses, he himself provides an excellent account of the place of this qualification in the theory of just punishment. S. KADISH, *supra* note 24, at 91-93.

ble of indefinite extension. One person's trivial impediment to effective enforcement is another person's version of catastrophe. If RSB and drug addiction can be excluded, why not insanity? Why not all excuses? Why not *mens rea* and proof beyond a reasonable doubt? Decisive answers cannot be found at the level of general theory. The issues call for hard work, close attention to detail, and — most unsatisfactorily of all — some form of "balancing." Social protection gains must be weighed against the *costs* entailed in ever-greater departures from the blame principle: stigma effects are blurred and the deterrent and educational effects of criminal condemnation can be sharply diluted. Abolition of all excuses, once seriously urged by an English magistrate,<sup>88</sup> would pose this problem dramatically. Complete abolition of the insanity defense, advocated most forcefully and intelligently by Professor Norval Morris,<sup>89</sup> would risk similar symbolic effects, with potentially pervasive consequences, in exchange for marginal social control advantages.<sup>90</sup> Despite great nervousness about insanity claims, the now-prevalent intuition — in my view a correct one — is that abolition is not worth the candle.

Other boundary issues in the law of excuse are more problematic. Drug addiction presents a much better case for excuse than RSB. Its etiology and symptomology are better defined. It is far less likely to cause violent behavior. Treatment prospects are better understood. And the necessary commitment period is not likely to be long.

This framework leaves plenty of room (some would say too much) for debate about the proper treatment of addiction and other control disorders. But the case for allowing an excuse is neither as obvious as Judge Bazelon implies nor as vulnerable as those preoccupied with public safety have maintained with such widespread recent success.

#### IV. CONCLUSION

The tide of public opinion and political consensus now runs strongly against the policy proposals that Judge Bazelon favors, and society stands largely unsympathetic to the wider perspective that he champions. Bazelon would insist on fault as a prerequisite to punishment and would demand that society place its first priority on alleviating the pressures that cause crime rather than on sanctioning of unfortunates who succumb to those pressures. Those who find themselves attracted, as I am, to these views, face the daunting task of de-

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88. B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 58-84 (1963).

89. See N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 53-76 (1982).

90. Compared with civil commitment, the penal alternative offers only small advantages (and in some cases only disadvantages) as a means of incapacitation. Professor Morris would argue, nonetheless, that preserving the insanity defense is hypocritical since it is defined in terms so narrow that many quite abnormal and morally blameless offenders fail to qualify for it. Proceeding from the same premise, Judge Bazelon would preserve the defense and expand it.

fending them on coherent, intellectually rigorous grounds. If Judge Bazelon's morally single-minded perspective sometimes obscures rather than clarifies the difficulties in this effort, he nonetheless provides the moral impetus for pursuing the task. He stops short, unfortunately, of showing us how to make the tough choices.

My conclusion, however, is that the design of criminal law doctrine and policy cannot escape the tough choices. I have in mind not only the well-understood tensions between fairness and efficiency, or between rules and discretion, but also between popular and critical moralities and between individual and social responsibility for the occurrence of crime. Unless simply denied or ignored, such tensions invariably derail smooth, deductive reasoning. There can be no closed system, no killer argument. At some level, doctrine is always incomplete or unsatisfactory, and conclusions turn merely on "balancing." These pessimistic reflections could easily lead to views sometimes associated with Critical Legal Studies — that doctrine is meaningless or that one legal argument is as good as any other. I do not take that step. While we cannot hope to explain complex human beings and complex social interactions in terms of any single-valued perspective, neither can we conclude that society and its structuring legal principles are, apart from economic and political self-interest, utterly inexplicable. That too would be to opt for only one side of a dilemma, to deny the claims of rationality and consistency in the ordering of social life.